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4 IN THE UNITED STATES DISTRICT COURT  
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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7 RUSSELL L. DEMAN, ) Case No. 10-4109 SC  
8 Plaintiff, )  
9 v. ) ORDER RE: DEFENDANTS'  
10 ALLIED ADMINISTRATORS, INC., ) MOTION FOR JUDGMENT ON THE  
11 NORTHERN CALIFORNIA TILE INDUSTRY ) PLEADINGS OR SUMMARY  
12 TRUST FUNDS, SHARON TURNER, and ) JUDGMENT, DEFENDANTS'  
13 LINDA MARTINEZ, ) MOTION TO STRIKE, AND  
14 Defendants. ) DEFENDANTS' EX PARTE  
 ) APPLICATION TO VACATE JURY  
 ) TRIAL AND SET CASE FOR  
 ) BENCH TRIAL  
 )  
 )

15 **I. INTRODUCTION**

16 This case concerns claims arising under the Employee  
17 Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq.  
18 ("ERISA"), brought by Plaintiff Russell L. Deman ("Plaintiff" or  
19 "Deman") against Defendants Allied Administrators, Inc., Northern  
20 California Tile Industry Trust Funds, Sharon Turner, and Linda  
21 Martinez (collectively, "Defendants"). The FAC asserts three  
22 claims: (1) denial of benefits under 29 U.S.C. § 1132(a)(1)(B);<sup>1</sup>  
23 (2) breach of fiduciary duty under § 1132(a)(2); and (3) delay in  
24 providing required information under § 1132(c)(1)(B).

25 Defendants move for judgment on the pleadings with respect to  
26 the second and third claims and summary judgment with respect to

27 \_\_\_\_\_  
28 <sup>1</sup> All further statutory citations refer to Title 29 of the United States Code.

1 the first claim. ECF No. 27 ("Mot."). Defendants also move for an  
2 award of attorney fees and costs. Id. Separate from the present  
3 motion, Defendants have filed (1) an ex parte application to vacate  
4 the jury trial scheduled for this case and set it for bench trial,  
5 ECF No. 37, and (2) a motion to strike portions of Plaintiff's  
6 declaration supporting his opposition brief, ECF No. 32.

7 Pursuant to Civil Local Rule 7-1(b), the Court finds this case  
8 suitable for decision without oral argument. For the reasons set  
9 forth below, the Court GRANTS Defendants' motion for judgment on  
10 the pleadings, GRANTS Defendants' motion for summary judgment, and  
11 DENIES AS MOOT Defendants' ex parte application and motion to  
12 strike. Consistent with Ninth Circuit precedent, Plaintiff's first  
13 claim is DISMISSED WITHOUT PREJUDICE and not on the merits, and his  
14 second and third claims are DISMISSED WITH PREJUDICE.

15

16 **II. BACKGROUND**

17       **A. The Parties**

18 Plaintiff Russell Deman began working for a tile company in  
19 1956.<sup>2</sup> ECF No. 18 ("FAC") § 5. No later than the end of 1961 he

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21       <sup>2</sup> For purposes of a motion for judgment on the pleadings, all of  
the nonmovant's factual allegations must be taken as true.  
22 Nevertheless, Plaintiff's FAC is no model of clarity. Solely to  
provide background, the Court supplements the FAC's allegations  
23 with the account contained in Defendant's Motion, which in turn is  
derived from the administrative record. The administrative record  
24 consists of exhibits attached to the declaration of Polly Baney.  
ECF No. 28 ("Baney Decl.") and Exs. 1-6 ("AR").

25 For purposes of a summary judgment motion, the Court not only  
may consider evidence outside of the pleadings, but must consider  
26 the administrative record. See, e.g., Graeber v. Hewlett Packard  
Co. Employee Benefits, 421 F. Supp. 2d 1246, 1252 (N.D. Cal. 2006).  
27 The Court is cognizant of Plaintiff's numerous objections to  
Baney's declaration and its exhibits. ECF No. 29; Opp'n at 2-13.  
28 They are not well-founded. To the extent that Plaintiff objects to  
Baney's declaration for lack of personal knowledge, the objection

1 had joined a union and begun to participate in its pension plan.  
2 Mot. at 2. That pension plan has become, through a series of  
3 mergers, Defendant Northern California Tile Industry Pension Plan  
4 ("Plan"), a defined benefit plan governed by ERISA. Id.

5 The Plan is administered by a Board of Trustees, currently the  
6 board of Defendant Northern California Tile Industry Trust Funds  
7 ("Board"). Id. The Board employs Defendant Allied Administrators  
8 to manage the Plan. Id. Defendants Sharon Turner ("Turner") and  
9 Linda Martinez ("Martinez") are employees of Allied Administrators.  
10 Baney Decl. § 51. Turner signed a November 17, 2009, letter  
11 stating that Plaintiff was ineligible for benefits. AR at 81. In  
12 that letter, she indicated that Plaintiff's counsel could call her  
13 or Martinez with any questions. Id.

14 **B. The Dispute**

15 In September 1992, Deman wrote a letter to his pension plan, a  
16 forerunner of the current Plan, seeking information about his  
17 retirement and pension benefits. Neither party has come forward  
18 with a copy of Deman's letter, but it is clear that the plan sent  
19 him a letter in response ("the 1992 Letter"), informing him that he  
20 was not eligible for benefits at that time. AR at 85; see also FAC  
21 ¶ 6. The 1992 letter explained that Deman's pension benefit would

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22 is OVERRULED. The declaration itself establishes Baney's personal  
23 knowledge that the documents constitute the administrative record  
24 of Deman's case. Federal Rule of Evidence ("FRE") 603. To the  
25 extent that Plaintiff objects to the exhibits attached to Baney's  
26 declaration as hearsay, the objection is OVERRULED. The exhibits  
27 are business records and Baney is their custodian. FRE 804(6). To  
28 the extent that Plaintiff objects to Baney's declaration on the  
ground that she offers expert testimony without having been  
qualified as an expert, the objection is OVERRULED. Baney's  
declaration is not expert in nature. To the extent that Plaintiff  
objects to lay opinions and legal conclusions contained in Baney's  
declaration, the objection is SUSTAINED. The Court has not  
considered Baney's lay opinions or legal conclusions.

1 vest after he accumulated 15 credits. Participants earned credits  
2 by working for a qualifying union employer a certain number of  
3 hours per year; the employer then reported the hours to the plan.  
4 The 1992 letter explained that due to breaks in service -- that is,  
5 periods of consecutive years in which no employer reported hours to  
6 the plan for Deman -- all of Deman's credits had been lost. It  
7 also stated that Deman could still qualify for a pension if he  
8 "return[ed] to covered employment." AR at 86. The letter  
9 purported to enclose documents describing "the procedures you  
10 should follow if you wish to appeal this decision." Id.

11 Plaintiff appears to have taken no further action until August  
12 31, 2009, when his attorney faxed a letter to Martinez stating that  
13 he represented Deman and requesting a copy of Deman's work record  
14 and information about his pension eligibility. Id. at 84. On  
15 November 17, 2009, Turner responded, asserting that the 1999 letter  
16 was correct and that if Deman "does not agree with the record  
17 provided and has supporting written documentation, please provide  
18 [it]." Id. at 81. The administrative record does not disclose  
19 that Deman did so before filing this lawsuit in August 2010, nor  
20 does he allege that he did.

21       C.     The Claims

22       In a previous order dismissing Deman's initial Complaint, the  
23 Court set forth the procedural history of this case's initial  
24 filing in state court and subsequent removal to federal court. See  
25 ECF No. 16 ("Order"). Plaintiff filed the First Amended Complaint  
26       ///  
27       ///  
28       ///

1 on January 13, 2011. ECF No. 18. Defendants filed an Answer on  
2 January 24, 2011. ECF No. 20 ("Answer").<sup>3</sup>

3 Because Defendants move for judgment on the pleadings, and  
4 Plaintiff's FAC is less than clear, the Court reviews the FAC's  
5 claims here. In doing so, the Court is mindful that "[s]pecific  
6 legal theories need not be pleaded so long as sufficient factual  
7 averments show that the claimant may be entitled to some relief."  
8 Young v. City of Visalia, 687 F. Supp. 2d 1141, 1145 (E.D. Cal.  
9 2009) (quoting Fontana v. Haskin, 262 F.3d 871, 877 (9th Cir.  
10 2001)); see also Ronald J. Cook, 2 ERISA Practice and Procedure §  
11 8:8 ("[C]ourts generally examine actions for benefits with some  
12 liberality and do not hesitate to look behind the allegations of  
13 the pleadings to see if an action . . . can be stated.").

14 The FAC asserts, first, that the present action arises under  
15 ERISA -- specifically, under §§ 1132(a)(1)(B) and 1132(c). FAC ¶

16 1. Section 1132(a)(1)(B) provides:

17 A civil action may be brought . . . by a participant or  
18 beneficiary . . . to recover benefits due to him under  
19 the terms of his plan, to enforce his rights under the  
terms of the plan, or to clarify his rights to future  
benefits under the terms of the plan[.]

20 Section 1132(c) primarily describes the powers of the  
21 Secretary of Labor (as opposed to private individuals) to issue  
22 fines for a plan's failure to supply requested information.  
23 However, one subsection, § 1132(c)(1)(B), provides plan  
24 participants with a right to recover statutory damages for a plan  
25 administrator's failure to supply requested information "within 30

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27 <sup>3</sup> In an apparent clerical error, Defendants filed two documents  
28 designated as Answers to the First Amended Complaint. The Court  
considered only the second-filed document, ECF No. 20.

1 days after such request . . . ." § 1132(c)(1)(B).<sup>4</sup> Although Deman  
2 does not specify that his claim for relief arises from §  
3 1132(c)(1)(B), he alleges in his FAC that he requested information  
4 from Defendants on August 31, 2009, and that Defendants failed to  
5 respond until December 2, 2009. FAC ¶¶ 7, 8, 18, 19. On the basis  
6 of those facts, the Court construes the pleading as asserting a  
7 claim under § 1132(c)(1)(B).

8 Defendants assume that, in addition to the two claims Deman  
9 expressly asserts, Deman also has asserted a claim for breach of  
10 fiduciary duty arising under either § 1132(a)(2) or § 1132(a)(3).  
11 See Mot. at 10-12; see also FAC §§ 13, 14. Any such claim would  
12 have to be implied from the pleading since the FAC does not mention  
13 §§ 1132(a)(2) or 1132(a)(3).

14 The Court construes the FAC as intending to allege a claim  
15 under § 1132(a)(2) but not under § 1132(a)(3). Section 1132(a)(2)  
16 provides that a plan participant may sue for appropriate relief  
17 under § 1109. Section 1109, in turn, provides in relevant part:

18 Any person who is a fiduciary with respect to a plan who  
19 breaches any of the responsibilities, obligations, or  
20 duties imposed upon fiduciaries by this subchapter shall  
21 be personally liable to make good to such plan any losses  
22 to the plan resulting from each such breach, and to  
23 restore to such plan any profits of such fiduciary which  
have been made through use of assets of the plan by the  
fiduciary, and shall be subject to such other equitable  
or remedial relief as the court may deem appropriate,  
including removal of such fiduciary.

24  
25 <sup>4</sup> The subsection sets forth various additional terms, only one of  
which is relevant here: it makes the award of damages or other  
relief under this subsection a matter of discretion for the  
district court. See § 1132(c)(1)(B). As discussed in Section  
26 IV.C, infra, district courts generally require a § 1132(c)(1)(B)  
claimant to show prejudice. See Kaiser Permanente Employees  
27 Pension Plan v. Bertozzi, 849 F. Supp. 692, 702 (N.D. Cal. 1994).  
28

1 The Court notes that Plaintiff prays for general and special  
2 damages, which is not inconsistent with the remedial scheme  
3 contemplated by § 1109 and hence with a § 1132(a)(2) claim. Cf.  
4 Wise v. Verizon Commc'ns, Inc., 600 F.3d 1180, 1190 (9th Cir. 2010)  
5 (interpreting putatively equitable claim for recovery of past and  
6 future benefits as one for money damages). Accordingly, the Court  
7 construes the FAC as alleging a claim under § 1132(a)(2).

8 Section 1132(a)(3), on the other hand, is a "catchall or  
9 safety net" provision providing equitable relief, and only  
10 equitable relief, for breaches of fiduciary duty not otherwise  
11 remedied by ERISA. Id. at 1190. Plaintiff does not pray for  
12 equitable relief; he seeks only money damages. FAC at 6-7 (prayer  
13 for relief). "Money damages are the classic form of legal relief,  
14 and are not an available remedy under ERISA's equitable safety  
15 net." Wise, 600 F.3d at 1190 (internal quotation marks omitted).  
16 Because Deman's FAC does not expressly assert a claim under §  
17 1132(a)(3) or seek the relief contemplated there, the Court does  
18 not construe the FAC to assert a § 1132(a)(3) claim.

19 To summarize, the Court finds that the FAC asserts the  
20 following three ERISA claims against Defendants:

21 (1) for general and special damages under § 1132(a)(1)(B);  
22 (2) for general and special damages under § 1132(a)(2); and  
23 (3) for statutory damages under § 1132(c)(1)(B).

24

25 **III. Legal Standards**

26 **A. Judgment on the Pleadings**

27 "After the pleadings are closed -- but early enough not to  
28 delay trial -- a party may move for judgment on the pleadings."

1 Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper when  
2 the moving party clearly establishes on the face of the pleadings  
3 that no material issue of fact remains to be resolved and that it  
4 is entitled to judgment as a matter of law." Hal Roach Studios,  
5 Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir.  
6 1990). Moreover, the pleading must contain sufficient factual  
7 matter, accepted as true, to state a claim to relief that is  
8 plausible on its face. Johnson v. Rowley, 569 F.3d 40, 44 (2d Cir.  
9 2009); see also Cafasso, U.S. ex rel. v. General Dynamics C4  
10 Systems, Inc., 637 F.3d 1047, 1055 n.4 (9th Cir. 2011) (citing  
11 Johnson with approval).

12 "Judgment on the pleadings is improper when the district court  
13 goes beyond the pleadings to resolve an issue; such a proceeding  
14 must properly be treated as a motion for summary judgment." Id.;  
15 see also Fleming v. Pickard, 581 F.3d 922, 925 n.4 (9th Cir. 2009)  
16 (refusing to consider supporting declarations in deciding motion  
17 for judgment on the pleadings).

18 **B. Summary Judgment**

19 Entry of summary judgment is proper "if the movant shows that  
20 there is no genuine dispute as to any material fact and the movant  
21 is entitled to judgment as a matter of law." Fed. R. Civ. P.  
22 56(a). The district court may consider only evidence that would be  
23 admissible at trial. See Fed. R. Civ. P. 56(c)(2). Summary  
24 judgment should be granted if the evidence would require a directed  
25 verdict for the moving party. Anderson v. Liberty Lobby, Inc., 477  
26 U.S. 242, 251 (1986). Thus, "Rule 56[] mandates the entry of  
27 summary judgment . . . against a party who fails to make a showing  
28 sufficient to establish the existence of an element essential to

1 that party's case, and on which that party will bear the burden of  
2 proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322  
3 (1986). "The evidence of the nonmovant is to be believed, and all  
4 justifiable inferences are to be drawn in his favor." Anderson,  
5 477 U.S. at 255. However, "[t]he mere existence of a scintilla of  
6 evidence in support of the [nonmovant]'s position will be  
7 insufficient; there must be evidence on which the jury could  
8 reasonably find for the [nonmovant]." Id. at 252.

9

10 **IV. DISCUSSION**

11 **A. Deman's § 1132(a)(1)(B) Claim for Denial of Benefits**

12 As explained in Section II.C supra, the FAC asserts a §  
13 1132(a)(1)(B) claim. On that claim, Defendants move for summary  
14 judgment rather than judgment on the pleadings. Mot. at 12.

15 Defendants argue that they are entitled to summary judgment  
16 because (1) Deman's claim is both statutorily and contractually  
17 time-barred as a result of the 1992 letter; (2) Deman has failed to  
18 file a formal claim and thus failed to exhaust his administrative  
19 remedies; and (3) the 1992 letter constituted a reasonable decision  
20 that Deman cannot successfully challenge under the "arbitrary and  
21 capricious" standard of review. See id. at 12. As set forth  
22 below, the Court needs only to address the first two.

23 **i. The Court Cannot Determine as a Matter of Law that**  
24 **Deman's Claim for Benefits Is Time-Barred.**

25 Defendants argue that Deman's claims are both statutorily and  
26 contractually time-barred. As the Ninth Circuit recently explained  
27 in Withrow v. Halsey, 655 F.3d 1032, 1035 (9th Cir. 2011), the two  
28 bars are distinct. The statutory time bar arises from cases

1 interpreting ERISA. Id. The contractual time bar imposes a  
2 second, distinct time limitation which arises as a matter of  
3 contract from the limitations term in the claimant's policy. Id.  
4 The statutory time limitation for claims arising in California, as  
5 Deman's have, is four years. Id. at 1036.

6 Defendants have not carried their burden of showing that  
7 Deman's claims are time-barred. With respect to the statutory time  
8 bar, Defendants must make a preliminary showing that Deman's §  
9 1132(a)(1)(B) claim "accrued" -- that is, that the statute of  
10 limitations has started to run. Defendants argue, apparently  
11 referencing the 1992 letter, that Deman's claim "accrued, if at  
12 all, in 1992 . . ." Mot. at 14.

13 The matter is not nearly so clear-cut. The Withrow court  
14 explained that

15 [a]n ERISA cause of action accrues either at the time  
16 benefits are actually denied, or when the insured has  
17 reason to know that the claim has been denied. A  
18 claimant has a "reason to know" under the second prong of  
19 the accrual test when the plan communicates a clear and  
20 continuing repudiation of a claimant's rights under a  
plan such that the claimant could not have reasonably  
believed but that his or her benefits had been finally  
denied.

21 655 F.3d at 1036 (citations and quotation marks omitted).  
22 Defendants do not argue that Deman's claim for benefits has been  
23 "actually denied," and such a position would be inconsistent with  
24 their argument that Deman never submitted a claim, see Section  
25 IV.A.ii infra. Instead, Defendants appear to rest their argument  
26 on the "reason to know" prong. But it is far from obvious that the  
27 1992 letter communicated a clear and continuing repudiation of  
28 Deman's rights such that he could reasonably believe only that his

1 benefits had been finally denied. The 1992 letter said that it was  
2 "still possible for [Deman] to qualify for a pension . . ." AR  
3 at 86. The Court cannot say that this language communicates a  
4 "clear" repudiation of Deman's rights, tantamount to a final denial  
5 of benefits. On the contrary, the 1992 letter informed Deman that  
6 he could still qualify for benefits.

7 Moreover, the Court cannot find a "continuing" repudiation on  
8 the basis of one letter. Defendants cite out-of-circuit authority  
9 for the proposition that "a" repudiation (that is, any repudiation)  
10 suffices to trigger ERISA's statutory time bar. Reply at 8. Such  
11 a test would omit the Ninth Circuit's requirement of a "continuing"  
12 repudiation. Defendants do not approach the requisite evidentiary  
13 showing of a clear and continuing repudiation. Thus, on the record  
14 before it, the Court cannot say that Deman's § 1132(a)(1)(B) claim  
15 accrued in 1992 for the purposes of the statutory four-year bar.

16 Nor can the Court find on this record that no genuine dispute  
17 exists concerning which iteration of the plan policy covered Deman  
18 in 1992. On a motion for summary judgment, "[w]here the moving  
19 party will have the burden of proof on an issue at trial, the  
20 movant must affirmatively demonstrate that no reasonable trier of  
21 fact could find other than for the movant." Dias v. Nationwide  
22 Life. Ins. Co., 700 F. Supp. 2d 1204, 1214 (E.D. Cal. 2010). The  
23 contractual bar Defendants seek to impose here is an affirmative  
24 defense, Answer § 23, and as such Defendants would bear the burden  
25 of proving it at trial. See Barnes v. AT&T Pension Ben. Plan-  
26 Nonbargained Program, 718 F. Supp. 2d 1167, 1174-75. Thus, to win  
27 summary judgment on this point, Defendants must "affirmatively  
28 demonstrate" that the applicable policy bars Plaintiff's claim.

Defendants have yet to make the prerequisite showing of which policy applies. They assert that the 1992 letter contained a copy of the benefits appeal procedures then in effect, denominated "Article X of the Plan." Mot. at 6 (reciting Baney Decl. ¶ 34). But nowhere do they demonstrate that this was the policy then in effect. Drawing inferences favorably to Deman, as required on summary judgment, Defendants can be read to equivocate on this point, in that they provide alternate calculations under two different iterations of the plan. See id. If evidence in the administrative record establishes which version of the policy applies, Defendants do not cite to it. On summary judgment, "[t]he court need consider only the cited materials . . . ." Fed. R. Civ. P. 56(c)(3). The cited materials do not affirmatively demonstrate which version of the plan relied upon by Defendants, if either, actually controlled in Deman's case.

Deman has every right to put Defendants to the proof of their affirmative defense and Defendants have not carried their burden. Accordingly, the Court cannot say on the record before it that Deman's claim for benefits is time-barred.

**ii. Deman Has Not Exhausted His Administrative Remedies.**

It is axiomatic that, before suing under § 1132(a)(1)(B), an ERISA claimant must challenge the denial of his or her benefits by filing a claim and exhausting the internal administrative review processes provided by his or her plan. Diaz v. United Agr. Employee Welfare Ben. Plan and Trust, 50 F.3d 1478, 1483 (9th Cir. 1995). Exceptions to the exhaustion doctrine exist where a claimant can show, in a demonstration that goes beyond bare assertion, that the administrative remedies are inadequate or that

1 exhaustion would be futile. See id. at 1485-87.

2 Defendants argue that Deman has not exhausted his  
3 administrative remedies for the elementary reason that he has yet  
4 to file a claim pursuant to the Plan's claim procedures. MTS at  
5 12-14. The Court agrees. The relevant material facts here are  
6 that Deman is a plan participant, that the plan provided  
7 administrative remedies, and that Deman has not availed himself of  
8 them. The first two facts are undisputed. As to the third, Deman  
9 presents no evidence that he has ever filed a claim. The only  
10 evidence Deman has offered in this case is his own declaration in  
11 support of his opposition brief. See ECF No. 30 ("Deman Decl.").<sup>5</sup>  
12 Plaintiff's opposition brief addresses Defendants' exhaustion  
13 argument, but the declaration is silent as to the existence of a  
14 formal claim. This silence is consistent with the administrative  
15 record's lack of any documents suggesting the existence of a claim,  
16 let alone an appeal. The only justifiable inference is that Deman  
17 has never availed himself of the Plan's administrative remedies.

18 Deman will have an opportunity to do so. Though Defendants  
19 have moved for summary judgment, the proper motion on which to  
20 raise a claimant's failure to exhaust nonjudicial remedies is an  
21 unenumerated Rule 12 motion to dismiss. Wyatt v. Terhune, 315 F.3d  
22 1108, 1119-1120 (9th Cir. 2003).<sup>6</sup> Under that procedure, the  
23 appropriate resolution of a § 1132(a)(1)(B) claim like Deman's is

24 <sup>5</sup> Deman's declaration contains legal argument and opinion, both of  
25 which the Court disregards. Given the ultimate disposition of this  
26 case, Defendants' motion to strike portions of Deman's declaration  
and its exhibits, ECF No. 32, is DENIED AS MOOT.

27 <sup>6</sup> The unenumerated Rule 12 motion is "a procedure closely analogous  
28 to summary judgment." Wyatt, 315 F.3d at 1120 n.14. Perceiving no  
difference between the two procedures in this case, the Court has  
considered Defendants' summary judgment motion as written.

1 to dismiss it as unripe -- without prejudice and not on the merits  
2 -- to permit the claimant to develop a factual record and file a  
3 formal claim with his pension plan. Foster v. Blue Shield of  
4 California, No. CV 05-03324 DDP, 2009 WL 1586039, at \*4 (C.D. Cal.  
5 June 3, 2009). Therefore, the Court GRANTS Defendants' summary  
6 judgment motion with respect to Deman's § 1132(a)(1)(B) claim and  
7 dismisses that claim without prejudice. This dismissal does not  
8 operate as an adjudication on the merits. Wyatt, 315 F.3d at 1119.

9 The Court does not reach Defendants' argument that the 1992  
10 letter constituted a reasonable final determination of Deman's  
11 entitlement to pension benefits.

12 **B. Deman's § 1132(a)(2) Claim for Breach of Fiduciary Duty**

13 With respect to Deman's second claim, Defendants move for  
14 judgment on the pleadings rather than summary judgment. The Court  
15 therefore confines itself to reviewing only the FAC and the Answer.  
16 Deman's second claim asserts that by denying benefits to Deman,  
17 Defendants have breached fiduciary duties allegedly owed to him.  
18 FAC § 13. Defendants respond that none of the Defendants owe Deman  
19 any fiduciary duties and that, even if they did, Deman's claim  
20 under § 1132(a)(2) must fail because Deman is suing on his own  
21 behalf rather than to recover losses incurred by the Plan itself.  
22 Mot. at 8-11.

23 It is doubtful that Defendants owed Deman a fiduciary duty,  
24 but the Court need not decide that question because Defendants'  
25 second argument is clearly correct and provides a narrower ground  
26 for decision. "The [§ 1132(a)(2)] claim for fiduciary breach gives  
27 a remedy for injuries to the ERISA plan as a whole, but not for  
28 injuries suffered by individual participants as a result of a

1 fiduciary breach." Wise, 600 F.3d at 1189. The FAC nowhere  
2 alleges harm to the plan as a whole. In his opposition brief,  
3 Plaintiff cites language which only confirms Defendants' point, in  
4 that it speaks only of losses to Plaintiff. Opp'n at 16 (quoting  
5 FAC ¶¶ 10-11). Accordingly, the Court GRANTS Defendant's motion  
6 for judgment on the pleadings with respect to Plaintiff's §  
7 1132(a)(2) claim and DISMISSES that claim WITH PREJUDICE.

8       **C. Deman's § 1132(c)(1)(B) Claim for Delay**

9           With respect to Deman's third claim, Defendants move for  
10 judgment on the pleadings rather than summary judgment. The Court  
11 therefore confines itself to reviewing only the FAC and the Answer.  
12 Deman's third claim, construed at Section II.C infra, asserts that  
13 Defendants unlawfully delayed in responding to Deman's requests for  
14 information. The allegations supporting this charge are paragraphs  
15 7, 8, 18, and 19, which describe Deman sending a letter through  
16 counsel on August 31, 2009, and receiving an answer on December 2,  
17 2009. Section 1132(c)(1)(B) imposes a thirty-day deadline for  
18 responding to requests for information that ERISA requires an  
19 administrator to furnish. Section 1132(c)(1)(B) further provides  
20 for statutory damages of \$100 per day for every day after the  
21 thirtieth; the award of any such damages or other relief is  
22 committed to the discretion of the district court. District courts  
23 generally require a § 1132(c)(1)(B) claimant to show prejudice  
24 resulting from the delay. Kaiser Permanente Employees Pension Plan  
25 v. Bertozzi, 849 F. Supp. 692, 702 (N.D. Cal. 1994).

26           The Court is not inclined to award relief in this case.  
27 Plaintiff has not alleged any prejudice resulting from Defendants'  
28 alleged delay. Nor does Plaintiff allege specifically which

1 information Defendants were required, but failed, to provide.  
2 Consequently, the Court cannot determine what Plaintiff thought he  
3 should have received or when the thirty day period would have  
4 begun, if ever. Plaintiff has not even stated a claim, let alone  
5 presented facts that would move the Court to exercise its  
6 discretion to award Plaintiff damages. The Court GRANTS  
7 Defendants' motion for judgment on the pleadings with respect to  
8 Deman's § 1132(c)(1)(B) claim and DISMISSES it WITH PREJUDICE.

9           **D. Defendants' Motion for Attorney Fees and Costs**

10 Defendants move for attorney fees and costs under § 1132(g).  
11 That section commits the award of attorney fees and costs to the  
12 discretion of the district court. The Ninth Circuit has set forth  
13 five factors to guide the district court's exercise of discretion:

14           (1) the degree of the opposing parties' culpability or  
15 bad faith; (2) the ability of the opposing parties to  
16 satisfy an award of fees; (3) whether an award of fees  
17 against the opposing parties would deter others from  
18 acting under similar circumstances; (4) whether the  
19 parties requesting fees sought to benefit all  
participants and beneficiaries of an ERISA plan or to  
resolve a significant legal question regarding ERISA; and  
   (5) the relative merits of the parties' positions.

20 Hummell v. S. E. Rykoff & Co., 634 F.2d 453 (9th Cir. 1980).

21 Considering these factors, the Court is not inclined to award  
22 attorney fees and costs in this case. The Court cannot say that  
23 Deman has acted culpably or that his positions must have appeared  
24 meritless to him or to his counsel when viewed prospectively rather  
25 than with the benefit of hindsight. Moreover, the Court is not  
26 persuaded that Deman could satisfy an award of attorney fees.  
27 Defendants make much of the deterrent aspect of attorney fee  
28 awards. But deterrence cuts both ways. In light of ERISA's policy

1 favoring administrative resolution of claims, it is more  
2 appropriate to funnel plaintiffs like Deman into administrative  
3 appeal procedures than to deter them from asserting their rights in  
4 court in the first instance. A grant of attorney fees and costs at  
5 this point in the case -- though perhaps not at a later one --  
6 would risk over-deterrence, which may further the policies  
7 underlying ERISA no better than under-deterrance would. The Court  
8 DENIES Defendants' motion for attorney fees and costs.

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1        **V.     CONCLUSION**

2                  For the reasons set forth above, the Court GRANTS Defendants' motion for judgment on the pleadings with respect to Plaintiff's claims under Sections 1132(a)(2) and 1132(c)(1)(B) and DISMISSES those claims WITH PREJUDICE. The Court also GRANTS Defendants' motion for summary judgment with respect to Plaintiff's claim under Section § 1132(a)(1)(B) and DISMISSES that claim WITHOUT PREJUDICE. This dismissal does not operate as an adjudication on the merits. Before filing another claim under Section 1132(a)(1)(B), Plaintiff must file a formal claim for pension benefits pursuant to the terms provided by his plan and, if his claim is denied, exhaust his administrative remedies or make a good faith argument explaining why he is excused from doing so.

14                 The Court DENIES Defendants' motion for attorney fees and costs. The Court DENIES AS MOOT Defendants' ex parte application and motion to strike. The Court VACATES the jury trial set for Tuesday, February 21, 2012. Accordingly, the Court DENIES Defendants' ex parte request to continue the trial date, ECF No. 39.

21                 IT IS SO ORDERED.

25                 Dated: January 24, 2012

